SUPREME COURT, U. S.
FEB 13 19
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1242

PAUL WARREN BATES,
Petitioner,

versus

STATE OF ALABAMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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No.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

By This Petition, Paul Warren Bates, respectfully seeks a writ of certiorari to review the judgment and opinions in this case of the Court of Criminal Appeals of Alabama at Montgomery, Alabama.

I. OPINIONS OF THE COURTS BELOW.

The trial court, the Circuit Court of Madison County, Alabama, did not render an opinion. A copy of the judgment and opinion of the Court of Criminal Appeals

of Alabama upon original submission is appended hereto as Appendix "A", and a copy of its order, without opinion, denying the application for rehearing is appended hereto as Appendix "B". The order of the Supreme Court of Alabama denying, without opinion, the petition for writ of certiorari to the Court of Criminal Appeals of Alabama is appended hereto as Appendix "C". The judgment and opinion of the Court of Criminal Appeals of Alabama upon original submission, as well as its subsequent order denying application for rehearing, is published and reported in 285 So. 2d 501. The denial of the petition for writ of certiorari by the Supreme Court of Alabama, without opinion, is published and reported in 285 So. 2d 506.

II. JURISDICTIONAL STATEMENT.

The Court of Criminal Appeals of Alabama rendered its original judgment and opinion on September 28, 1973. It denied the application for rehearing on October 16, 1973. The Supreme Court of Alabama denied the petition for writ of certiorari to the Court of Criminal Appeals of Alabama on November 15, 1973. The original judgment and opinion of the Court of Criminal Appeals of Alabama rendered on September 28, 1973, thereby became a final judgment which the highest court of the State of Alabama refused to disturb.

The statutory provision believed to confer jurisdiction on this Honorable Court to review the final judgment rendered on September 28, 1973, by the Court of Criminal Appeals of Alabama is 28 U.S.C. Section

1257(3). In the courts below, Petitioner specially set up and claimed rights, privileges and immunities guaranteed to him under the Sixth Amendment to the Constitution of the United States of America.

III. QUESTION PRESENTED FOR REVIEW.

Whether the Trial Court's giving to the jury for their consideration and scrutiny in the jury room an affidavit for a search warrant which was admitted into evidence over the objection of Petitioner, even though the affidavit contained grossly injurious hearsay testimony, deprived Petitioner of his right to be confronted by the witnesses against him guaranteed by the Sixth Amendment to the Constitution of the United States of America made applicable to the States by the Fourteenth Amendment.

IV. CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES.

The Constitutional provision involved in this case is the Sixth Amendment to the Constitution of the United States, reading:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him;

to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

V. STATEMENT OF THE CASE.

This case arose out of the arrest and subsequent indictment of Paul Warren Bates on a charge of buying, receiving, concealing or aiding in concealing a stolen money order machine. The Petitioner entered a plea of not guilty and the case was tried before a jury who found the Petitioner guilty on January 6, 1972. The Petitioner was sentenced to be imprisoned in the State Penitentiary for a period of eight years as punishment.

The conviction was appealed to the Court of Criminal Appeals of Alabama which affirmed the case in its opinion rendered September 28, 1973. Petitioner filed an application for rehearing which was overruled and denied, without opinion, by the Court of Criminal Appeals of Alabama on October 16, 1973. Petitioner then filed a petition for writ of certiorari which was denied, without opinion, by the Supreme Court of Alabama on November 15, 1973.

The relevant facts are not in dispute. On April 27, 1971, Detective Bragg of the Huntsville Police Department investigated a burglary at Roy Jack's Grocery. He went to the scene and was told by Mr. Campbell, the owner, that ninety cartons of cigarettes, a Consumer Money Order Machine, and forty-four money orders were missing. The owner stated that taped to

the machine was the name "Max Gray" and a telephone number. Detective Bragg saw one burglary suspect, Joe Dean Bryant, sitting in a patrol car at the scene. That same night, after the burglary, Detective Bragg saw a small black English Ford in front of the B & B Cafe. The automobile was unoccupied at the time. He went to Judge Dave Archer on May 5, 1971, and made affidavit for a warrant to search the cafe. Deputy Sheriff Bob Eddy accompanied him when the warrant was executed on Petitioner. In a room adjoining the cafe dining room, the money order machine was found in a cardboard box at the foot of a cot. Taped to the machine was the name "Max Gray" and the number 63.54.

The State introduced into evidence the affidavit for the search warrant (State's Exhibit 1) and the search warrant (State's Exhibit 2) over the objection of Petitioner that the affidavit was based upon hearsay evidence.

The affidavit, which is set out *in toto* in the lower court's opinion on original submission and attached hereto as Appendix "A", contained the following hearsay testimony:

> "Last night about 11:45 P.M., a confidential informer told officers that he was to go with Joe Dean Bryant & William O. Smith and others to break into Roy Jacks Grocery and that he did not but that these boys went to Jacks Grocery in Black English Ford and that they

talked to him about the burglary and told him they had broken in and stolen cigarettes and money order machine and went back to get meat and got caught. They told him they took items to Paul Bates at the B & B Cafe and sold them. This confidential informer went to Paul Bates B & B Cafe and saw a money order machine at the cafe two days ago. This informer had given information on other occasions that has proven correct and has resulted in some arrests. Further, on the night of the burglary of Jacks Grocery, this detective saw a black English Ford parked at the B & B Cafe after the approximate time of the burglary, and also, both Bryant and Smith have been arrested for this burglary of Jacks Grocery and were in a black English Ford." (Tr. p. 57)

It is not in dispute that the Trial Court gave this affidavit for search warrant to the jury for their consideration and scrutiny in the jury room. (Tr. p. 55)

The question of the hearsay testimony contained in the affidavit for the search warrant was raised in the Trial Court by objection to its admission into evidence. (Tr. p. 12 & 13) The question was again raised in the Trial Court by Petitioner's motion for a new trial which the Trial Court denied. (Tr. p. 65 & 66)

The Petitioner first raised the federal question sought to be reviewed in the Court of Criminal Appeals of Alabama by Assignments of Error Nos. 4 and 5,

which were ignored by the appellate court. The Petitioner first raised the federal question sought to be reviewed in the Supreme Court of Alabama, which is the highest court in the State, by filing his petition for writ of certiorari, which was subsequently denied.

VI. REASONS FOR GRANTING THE WRIT.

The Court of Criminal Appeals of Alabama, supported by the Supreme Court of Alabama's denial of certiorari, has decided a federal constitutional question of substance involving Sixth Amendment rights in a way probably not in accord with applicable decisions of this Honorable Court.

VII. ARGUMENT.

The Petitioner respectfully requests that this Honorable Court grant certiorari to review the action of the Court of Criminal Appeals of Alabama in upholding the denial by the Trial Court of the right to be confronted with the witnesses against him as guaranteed by the United States Constitution.

The Trial Court permitted the jury to take into the jury room the affidavit filled with hearsay upon hearsay. The ultimate fact to be decided by the jury, that is, whether Paul Bates bought stolen property, was contained in the affidavit in the following language:

> "They told him they took items to Paul Bates at the B & B Cafe and sold them. This con-

fidential informer went to Paul Bates B & B Cafe and saw a money order machine at the cafe two days ago."

The right of an accused to be confronted with the witnesses against him granted by the Sixth Amendment to the United States Constitution has been made applicable to the States through the due process clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923.

Quite curiously, at no point in an opinion or otherwise does the Court of Criminal Appeals or the Supreme Court of Alabama write to the question of the jury's access to the damaging hearsay evidence contained in the affidavit for the search warrant. The precise question was repeatedly raised and argued by the Petitioner in both courts, but to no avail. By refusing to address themselves to the question, both lower courts incorrectly construed confrontation and cross-examination provisions of the Sixth Amendment to the Constitution of the United States. Where a state appellate court refuses to face the issue and, for all practical purposes, decides a federal constitutional question adversely to an accused, the accused should not then be denied the right of higher appellate review of his conviction. The Court of Criminal Appeals of Alabama erred in holding that the use and viewing of the hearsay affidavit by the jury did not offend the confrontation provision of the Sixth Amendment.

CONCLUSION.

For the reasons stated, this Petition for writ of certiorari to the Court of Criminal Appeals of Alabama should be granted.

Respectfully submitted,

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(205) 539-9571
Counsel of Record
For Petitioner

CERTIFICATE.

I hereby certify that a copy of the foregoing petition for writ of certiorari has been served upon opposing counsel by placing the same in the United States mail with adequate postage affixed thereto addressed to Honorable William Baxley, Attorney General for the State of Alabama, 250 Administrative Building, Montgomery, Alabama, this ____ day of February, 1974.

Of Counsel

APPENDIX "A"

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1972-73

8 Div. 282

Paul Warren Bates
versus
State

Appeal from Madison Circuit Court

DeCARLO, Judge

Paul Warren Bates was indicted on a charge of buying, receiving, concealing or aiding in concealing a stolen money order machine. He was found guilty in the Circuit Court of Madison County and sentenced to eight years.

The relevant facts are not in dispute. On April 27, 1971, Detective Bragg of the Huntsville Police Department investigated a burglary at Roy Jack's Grocery. He went to the scene and was told by Mr. Campbell, the owner, that ninety cartons of cigarettes, a Consumer Money Order Machine, and forty-four money orders were missing. The owner stated that taped to the machine was the name "Max Gray" and a telephone number. Detective Bragg saw one burglary suspect, Joe Dean Bryant, sitting in a patrol car at the

scene. That same night, after the burglary, Detective Bragg saw a small black English Ford in front of the B. & B. Cafe. The automobile was unoccupied at the time. He went to Judge Dave Archer on May 5, 1971, and applied for a warrant to search the cafe. Deputy Sheriff Bob Eddy accompanied him when the warrant was executed. In a room adjoining the cafe dining room, the money order machine was found in a cardboard box at the foot of a cot. Taped to the machine was the name "Max Gray" and the number 63.54.

The State introduced the search warrant and its supporting affidavit, which were identified by Detective Bragg. Appellant questioned the validity of the warrant and asked to take this witness on voir dire. The examination was conducted in the presence of the jury, without objection. Subsequently the Court overruled appellant's objection that the affidavit was based on hearsay evidence.

The most important question presented in this appeal is whether sufficient evidence establishing probable cause was before the issuing magistrate. The sole evidence upon which the warrant was issued is contained in the following affidavit:

"COPY OF STATE'S EXHIBIT 1
"STATE OF ALABAMA
CIRCUIT COURT
"COUNTY OF MADISON

"AFFIDAVIT FOR SEARCH WARRANT
"Comes *Nolan Bragg* an officer of the law of

the State of Alabama, now holding the position of *Detective* with the: (agency or department) *Huntsville Police Department* before the Honorable _____, Judge or Magistrate of the _____ Court of Madison County, *Huntsville, Alabama;* and being duly sworn, on oath deposes and says that he is informed and believes and upon such information and belief verily states that the following statement of facts presented to the Court, as probable cause of the issuance of a search warrant, are true and correct:

"I have been personally informed by *confidential informer* a reliable informant that certain personal property, more particularly described as follows, to wit: *Consumer Money Order, bearing the name Max Gray, bearing the number 63.54* is concealed in or about the premises of: *Paul Bates, located at the B & B Cafe, 122 Abington Avenue, N. W., Huntsville, Alabama* Madison County, Alabama, I further depose and say that the reasons for my belief that the above information is reliable and for my belief in the reliability of the aforenamed informer are as follows: *Last night about 11:45 P. M. a confidential informer told officers that he was to go with Joe Dean Bryant & Wm. O. Smith and others to break into Roy Jacks Grocery and that he did not but that these boys went to Jacks Grocery in Black English Ford and that they talked to him about the burglary and told him they had broken in and stolen*

cigarettes and money order machine and went back to get meat and got caught. They told him they took items to Paul Bates at the B & B Cafe and sold them. This confidential informer went to Paul Bates B & B Cafe and saw a money order machine at the cafe two days ago. This informer has given information on other occassions (sic) that has proven correct and has resulted in some arrests. Further, on the night of the burglary of Jacks Grocery, this detective saw a black English Ford parked at the B & B Cafe after the approximate time of the burglary, and also, both Bryant and Smith have been arrested for this Burglary of Jacks Grocery and were in a black English Ford. Affiant further believes that the aforesaid personal property, goods, wares, or merchandise is concealed or held illegally, by the aforementioned owner or person in possession of the above described premises, due to the following fact, that said property:

" X is property that has been stolen or embezzled, or

" X was used as the means of committing a felony, or

"____ it is now on said premises in the possession of a person or persons with the intent to use it as a means of committing a public offense, or

"____ it is in the possession of a person or persons to whom it was delivered unlawfully for the purpose of concealing it or preventing its discovery.

"/s/ *Nolan R. Bragg*

"Sworn to and subscribed before me this 5th day of May, 1971

"/s/ *David S. Archer.*"

In *Aguilar v. Texas*, 378 U. S. 108, 84 S.Ct. 1509, the U. S. Supreme Court Stated:

"An evaluation of the constitutionality of a search warrant should begin with the rule that 'the informed and deliberate determinations of magistrates empowered to issue warrants * * * are to be preferred over the hurried action of officers * * * who may happen to make arrests.' United States v. Kefkowitz, 285 U. S. 452, 464, 52 S.Ct. 420, 423, 76 L.Ed. 877: The reasons for this rule go to the foundations of the Fourth Amendment."

In order for a search warrant to be sufficient and satisfy the constitutional requirement of probable cause, the affidavit upon which it is based must contain competent evidence to support the magistrate's finding. *Skelton v. Superior Court of Orange County*, 460 P.2d 485. The sufficiency of an affidavit is deter-

mined by whether it meets the stipulations for probable cause as laid down in *Aguilar*, supra.

That test is two-fold and sets the following requirements:

> ". . . [T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see Rugendorf v. United States, 376 U. S. 528, 84 S.Ct. 825, was 'credible' or his information 'reliable'. Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitutional requires. . ."

The appellant Bates contends that this affidavit was based on hearsay, thus insufficient for the issuance of a search warrant. He argues that Detective Bragg's affidavit is deficient as the allegation that stolen goods were delivered to Bates or were recently observed on the B. & B. Cafe premises is not corroborated. Neither *Aguilar*, supra nor *Spinelli v. United States*, 393 U. S. 410, 89 S.Ct. 584, required "corroboration" or independent evidence of the reliability of information contained in an affidavit. *Skelton*, supra.

The appellant here questions whether the affidavit which sets out personal observations of one other than

the affiant is sufficient to establish probable cause to search. So long as there appears a substantial basis for crediting the hearsay, an affidavit is not to be deemed insufficient. *Jones v. U. S.*, 362 U.S. 257, 80 S.Ct. 725.

> "If an officer may act upon probable cause without a warrant when the only incriminating evidence in his possession is hearsay, it would be incongruous to hold that such evidence presented in an affidavit is insufficient basis for a warrant. If evidence of a more judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant must be presented when a warrant is sought, warrants could seldom legitimatize police conduct, and resort to them would ultimately be discouraged."
>
> * * * *
>
> "We conclude therefore that hearsay may be the basis for a warrant." Jones, supra.

We say that in the instant case there was sufficient basis for accepting the hearsay, and that the magistrate acted properly. Judge Archer did not need to be convinced that the money order machine was in the B. & B. Cafe, but only that it probably was.

It should be noted that the first informer furnished Detective Bragg with information that the money or-

der machine was located on the premises of B. & B. Cafe. The source of the detective's next information was the police officers' informer, and that information was credited by the following facts within Detective Bragg's own knowledge:

1. At the scene of the burglary, he observed a box containing items of meat, etc. sitting just outside the back door.
2. At this time, he also saw Joe Dean Bryant sitting in the patrol car.
3. He knew that Joe Dean Bryant and another had been arrested for the crime.
4. He had seen a small black English Ford parked at the B. & B. Cafe on the night in question.

The foregoing facts all contributed to a substantial basis for crediting the hearsay and insuring the reliability of not only the police informer, but the original informer who placed the goods at the appellant's location.

Although the first informer may not have been previously tested for his reliability, we hold that the informer was tested in the instant case. An informer need not be shown to be reliable any particular number of times. The accuracy of his information was analyzed in every particular, and its reliability met the test of justifying a reasonable man in believing the machine was probably located on the B. & B. premises. *Clenney v. State*, 281 Ala. 9, 198 So.2d 293.

The appellant takes the position that the search warrant was defective in that it described the article to be seized as a Consumer Money Order when in fact, the article seized was a Paymaster Money Order Machine.

The face of the warrant showed the article in question as a Consumer Money Order, bearing the name "Max Gray" and the number 63.54. Mr. Campbell, the owner of the store, described it as follows:

> "Well, it was a small money order. It had Max Gray on the machine and his telephone number. He is the superintendent —"

We hold that the description here in the affidavit and the search warrant were specific enough to enable the officers to identify and locate the machine. It is sufficient if the description is such that a prudent officer is able to locate the property with reasonable certainty from the face of the warrant.

Counsel for appellant insists the court committed error when it allowed the solicitor to ask certain questions and argue to the jury matters he claims were improper.

After a consideration of each of the questions and statements cited by defense, we do not find their effect created an atmosphere of prejudice toward this appellant. In each instance, the court made a proper ruling, and where necessary, directed the jury to disregard those statements.

Each case must be determined by its own peculiar facts with much discretion left to the trial judge. *Garrett v. State,* 268 Ala. 299, 105 So.2d 541. In such situations, the trial judge sits in the pit and is in a much better position to determine whether a remark or question is so prejudicial as to constitute error. *McAllister v. State*, 44 Ala. App. 511, 214 So.2d 862.

In conclusion, the trial judge in his oral charge impressively admonished the jury in the following manner:

> "Now, ladies and gentlemen, you have heard some evidence in this case in regard to some issue of some bootlegging or some liquor in this case. Now, ladies and gentlemen, you are not concerned with whether this defendant has ever sold or manufactured or drank any liquor or anything else. That's not an element in this case from the standpoing(sic) of consideration by you of his guilt. Whatever evidence is in this case relative to that is evidence that came in in relationship to some other issue. As to whether or not that he had a reputation of being a bootlegger, if he does, whether or not he has ever sold whiskey is no concern of yours. The concern of yours in this case is whether or not he is guilty under this indictment, whether he did buy, receive, conceal or aid in concealing stolen property. That is the only issue in this case regardless of what else

> might be considered or known or thought about him. It doesn't make any difference. The issue for you to determine in this case is whether or not he did buy, receive, conceal or aid in concealing stolen property and you confine it to that issue."

Last the appellant complains that the trial court committed error when it refused his requested charges, one, two and four.

We find no error in the court's rulings in this respect as each requested charge was adequately covered in the court's oral instructions to the jury.

After a careful reading of this record, and much consideration of those matters stressed in appellant's brief, it is our judgment that there is no error in the record, and the judgment of conviction is due to be affirmed.

The judgment below is hereby
AFFIRMED.

Cates, P. J., and Tyson, J., concur.
Almon and Harris, J. J., concur in result.

September 28, 1973

STATE OF ALABAMA — JUDICIAL DEPARTMENT
COURT OF CRIMINAL APPEALS

8 Div. 282

Paul Warren Bates

v.

State

Appeal from Madison Circuit Court

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the Court; it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the Appellant pay the costs of appeal of this Court and of the Circuit Court.

APPENDIX "B"

October 16, 1973

STATE OF ALABAMA — JUDICIAL DEPARTMENT
COURT OF CRIMINAL APPEALS

8 Div. 282

Paul Warren Bates

v.

State

Appeal from Madison Circuit Court

It is hereby ordered that the application for rehearing filed in this cause be and the same is hereby overruled.

APPENDIX "C"

THE THE SUPREME COURT OF ALABAMA
THURSDAY, NOVEMBER 15, 1973

PRESENT: ASSOCIATE JUSTICES MERRILL, COLEMAN, HARWOOD, BLOODWORTH, MADDOX, MCCALL AND FAULKNER

NOT PRESENT: CHIEF JUSTICE HEFLING AND ASSOCIATE JUSTICE JONES

SC 579

Ex Parte: Paul Warren Bates
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Paul Warrent Bates v. State)

Comes the petitioner and submits his petition for writ of certiorari to the Court of Criminal Appeals for preliminary examination and the petition being duly examined and understood by the Court, it is considered and ordered that the petition is due to be denied, and that the petition be, and the same is hereby, dismissed at the costs of the petitioner, for which costs let execution issue.

Heflin, C. J., Coleman, Bloodworth, McCall & Jones, JJ., Concur.

Supreme Court, U. S.
FILED
MAR 14 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1242

PAUL WARREN BATES,
PETITIONER

—VS—

STATE OF ALABAMA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

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PAUL WARREN BATES,
PETITIONER

—VS—

STATE OF ALABAMA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions below are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED FOR REVIEW

The question presented for review is adequately set forth in the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are adequately set forth in the Petition.

STATEMENT

This case arose out of the arrest and subsequent indictment by the Madison County, Alabama, Grand Jury of Paul Warren Bates on a charge of buying, receiving, concealing, or aiding in concealing a stolen money order machine. The Petitioner entered a plea of not guilty and the case was tried before a jury in the Madison County, Alabama, Circuit Court, which found the Petitioner guilty on January 6, 1972. The Petitioner was sentenced to be imprisoned in the State Penitentiary for a period of eight years as punishment for his crime.

The conviction was appealed to the Court of Criminal Appeals of Alabama which affirmed the case in its opinion rendered on September 28, 1973. Petitioner filed an Application for Rehearing which was denied, without opinion, by the Court of Criminal Appeals of Alabama on October 16, 1973. Petitioner then filed a Petition for Writ of Certiorari which was denied, without opinion, by the Supreme Court of Alabama on November 15, 1973.

The relevant facts are not in dispute. On April 27, 1971, Detective Bragg of the Huntsville Police Department investigated a burglary at Roy's Grocery. He went to the scene and was told by Mr. Campbell, the owner, that ninety cartons of cigarettes, a consumer Money Order Machine, and forty-four money orders were missing. The owner stated that taped to the machine was the name "Max Gray" and a telephone number. Detective Bragg saw one burglary sus-

pect, Joe Dean Bryant, sitting in a patrol car at the scene. That same night, after the burglary, Detective Bragg saw a small black English Ford in front of the B. & B. Cafe. The automobile was unoccupied at the time. He went to Judge Dave Archer on May 5, 1971, and applied for a warrant to search the cafe. Deputy Sheriff Bob Eddy accompanied him when the warrant was executed. In a room adjoining the cafe dining room, the money order machine was found in a cardboard box at the foot of a cot. Taped to the machine was the name "Max Gray" and the number 63.54.

The State introduced the search warrant and its supporting affidavit, which were identified by Detective Bragg. Appellant questioned the validity of the warrant and asked to take this witness on voir dire. The examination was conducted in the presence of the jury, without objection. Subsequently the Court overruled Appellant's objection that the affidavit was based on hearsay evidence.

ARGUMENT

The Petitioner's objection was as to the admissibility into evidence of the affidavit for the search warrant (State's Exhibit 1) and the search warrant (State's Exhibit 2).

The trial court correctly overruled the objection and the Alabama Court of Criminal Appeals affirmed, holding: "We say in the instant case there was sufficient basis for accepting the hearsay, and that the magistrate acted properly. Judge Archer did not need to be convinced that the money order machine was in the B. & B. Cafe, but only that it probably was."

The Alabama Court of Criminal Appeals based this

holding on *Jones v. U. S.*, 362 U. S. 257, 80 S. Ct. 725, which concluded that hearsay may be the basis for a warrant.

This Honorable Court has further held that a Magistrate's determination of probable cause for the issuance of a search warrant should be paid great deference by the reviewing court. *Spinelli v. U. S.*, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584; *Jones v. U. S.*, supra.

The Alabama Court of Criminal Appeals held that the affidavit met the requirement set out in *Aquilar v. Texas*, 378, U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509. *Aquilar* held that although an affidavit supporting a search warrant may be based on hearsay information and need not reflect the direct personal observations of the affiant, the Magistrate must be informed of some of the underlying circumstances from which the informant concludes that contraband, such as narcotics, is where he claims it, and some of the underlying circumstances from which the officer concludes that the informant, whose identity need not be disclosed, is credible or his information reliable. *Aquilar v. Texas*, supra; *Rugendorf v. U. S.*, 376 U.S. 528, 11 L. Ed. 2d 887, 84 S. Ct. 825.

Since only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause for the issuance of a search warrant, there is no question that the warrant was properly issued in this case. *Spinelli v. U. S.*, 393 6. S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584; *Beck v. Ohio*, 379 U. S. 89, 96, 13 L. Ed. 2d 142, 147, 85 S. Ct. 223.

Further, a magistrate's determination of probable cause for the issuance of a search warrant should be paid great deference by the reviewing court. *Spinelli v. U. S.*, supra;

Jones v. U. S., supra. So, the trial court properly received them into evidence.

The question presented by this Petition is whether the trial court's giving to the jury for their consideration and scrutiny in the jury room an affidavit for a search warrant which was admitted into evidence over the objection of Petitioner, even though the affidavit contained grossly injurious hearsay testimony, deprived Petitioner of his right to be confronted by the witnesses against him guaranteed by the Sixth Amendment to the Constitution of the United States of America made applicable to the States by the Fourteenth Amendment.

The Petitioner finds it curious that at no point in the opinion or otherwise does the Court of Criminal Appeals or the Supreme Court of Alabama write to the question of the jury's access to the damaging hearsay evidence contained in the affidavit for the search warrant.

The answer is quite simple. Matters not objected to cannot be considered for the first time on appeal. *Haefer v. Snellgrove*, 288 Ala. 407, 261 So. 2d 431.

The record shows that after the trial court charged the jury he said:

> "Now, ladies and gentlemen, you will have the indictment in this case. You will have the affidavit and the search warrant and the return, which have been introduced in evidence. You will have the little card which has been introduced in evidence. You will also have, ladies and gentlemen, the forms of verdict which I have prepared and which you will have. After I have finished here, ladies and gentlemen, I am going to let you stay here to consider this case.

"Anything further from the State?

"MR. GREEN: Nothing further.

"THE COURT: Mr. King?

"MR. KING: No, sir."

It is clear then that there was no objection and the issue was not reserved for appeal.

The case was affirmed because the Alabama Court of Criminal Appeals and the Supreme Court of Alabama found no error in the trial court's rulings.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the instant Petition For Writ of Certiorari is due to be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, one of the attorneys for the Respondent and a member of the Bar of the Supreme Court of the United States, and I, Kent Brunson, one of the attorneys for the Respondent, hereby certify that on this ——— day of ————, 1974, we did serve the requisite copies of the foregoing Brief and Argument in Opposition of Respondent on Honorable Charles King, by placing said copies in the mail, postage prepaid, and properly addressed to said attorney of record as follows:

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